RECEIVED
OCT 26 1976
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ORIGINAL COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 76-5306

ERNEST JOHN DOBBERT, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

LOUIS O. FROST, JR.
PUBLIC DEFENDER
Fourth Judicial Circuit
221 Duval County Courthouse
Jacksonville, Florida 32202

WILLIAM P. WHITE, III
Chief Assistant Public Defender
Jacksonville, Florida 32202

Attorneys for Petitioner

CASES CITED:

	PAGE
Donaldson v. Sack 265 So. 2d 499 (Fla. 1972)	2
Furman v. Georgia 408 U.S. 238 (1972)	2
75 Op. Atty. Gen. (1972)	2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 76-5306

ERNEST JOHN DOBBERT, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Pursuant to Rule 24(5) of the Rules of the Supreme Court of the United States, Petitioner would submit the following supplemental authority in support of his petition for writ of certiorari:

In an official opinion of the Attorney General of the State of Florida, number 972-75[1], dated March 10, 1972, an application of Article X, Section 9, of the 1968 Constitution of Florida was at issue. The question presented to the Attorney General was as follows:

> IN THE LIGHT OF CHAPTER 71-136, EFFECTIVE JANUARY 1, 1972, IS IT MANDATORY THAT A MAN CONVICTED OF RAPE BE SENTENCED TO LIFE IMPRISONMENT WHEN HE RECEIVES A RECOMMENDATION OF MERCY?

1. This authority is submitted after the petition for certiorari. It was arguably "available" at an earlier date. Upon "Shepardizing" the opinions of the Attorney General of Florida and the Constitutional provision at issue, the cross-reference does not appear. The citation was discovered inadvertantly at a time subsequent to the submission of the petition.

The Florida rape statute, prior to January 1, 1972, provided that upon a recommendation of mercy by the jury, a person convicted of rape would be sentenced to life or any term of years, within the discretion of the judge. The 1972 amendment removed the possibility of any sentence other than life imprisonment.

The Attorney General addressed the issue of a rape committed prior to January 1, 1972:

> "However, this change in penalties has no effect upon the punishment for rape committed prior to January 1, 1972, even though a conviction was not obtained until on or after that date; in such a case the penalty provided by Section 794.01, Florida Statutes 1969, is to be imposed and this means that if there is a recommendation of mercy, the defendant may be sentenced to either life imprisonment or any term of years. This is so because Article X, Section 9, 1968 Constitution of Florida, provides that:
>
> 'SECTION 9. Repeal of criminal statutes. - Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.'
>
> Turner v. State, 99 So. 334, 336 (Fla), illustrates the application of a former constitutional provision to exactly the same effect as said Article X, Section 9, viz., Article III, Section 32, Florida Constitution of 1885." 75 Op. Atty. Gen. (1972).

The Attorney General of the State of Florida thus has recognized the binding effect of Article X, Section 9 of the Florida Constitution. As was shown in the petition for writ of certiorari, the case law interpreting this provision has consistently upheld the view expressed in the Attorney General's opinion, supra.

The proper course of action for the trial court in the case sub judice was to first attempt to place the Petitioner in the same position he would have been if there had been no repeal or amendment of Florida Statutes, Sections 775.082(1) (1971) and

921.141 (1971). Since death penalty provisions had been ruled unconstitutional by the time of Petitioner's trial, the trial court should have gone forward with the understanding that the maximum penalty remaining after Furman v. Georgia, 408 U.S. 238 (1972), and Donaldson v. Sack, 265 So. 2d 499 (Fla. 1972), would be life imprisonment.

Respectfully submitted,

LOUIS O. FROST, JR.
PUBLIC DEFENDER

WILLIAM P. WHITE, III
CHIEF ASSISTANT PUBLIC DEFENDER

Fourth Judicial Circuit
221 Duval County Courthouse
Jacksonville, Florida 32202

Attorneys for Petitioner